Whisper Soft Mills, Inc. *and* Pacific Northwest District Council, International Ladies Garment Workers Union, AFL-CIO. Cases 20-CA-15493 and 20-CA-15672

26 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

On 14 April 1981 Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs. Respondent filed an answering brief, cross-exceptions, and a brief in support of its cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

As more fully set forth by the Administrative Law Judge, the facts reveal that on 29 November 1979 the International Ladies Garment Workers Union, AFL-CIO, was certified by the Board as the representative of Respondent's production employees.[2] Contract negotiations began on 15 January 1980.[3] Twelve bargaining sessions were held between 15 January and 20 August. A strike against Respondent started on 25 August, and six more bargaining sessions were held between 2 September and 14 November. On 16 December Respondent withdrew recognition from the Union and has refused to bargain with the Union thereafter as it claims it has a good-faith doubt of the Union's continuing majority status.

The General Counsel alleged that Respondent committed various unfair labor practices during the negotiations before the strike, that the strike was an unfair labor practice strike, and that Respondent committed other unfair labor practices during negotiations after the strike. He also alleged that Respondent illegally withdrew recognition from the Union. The Administrative Law Judge, however, concluded that Respondent had not violated the Act; that the strike was an economic strike rather than an unfair labor practice strike; and that Respondent was privileged to withdraw recognition from the Union. Accordingly, he dismissed the complaint. For the following reasons, we disagree with various of the Administrative Law Judge's findings.

I. THE INITIAL UNFAIR LABOR PRACTICES

1. The parties concerned themselves with noneconomic matters at their first bargaining session. At the second session, on 20 February, Respondent asserted that its policy was to grant wage increases in September, when it raised customer prices. Also, at the 20 February session, Mason, Respondent's attorney and chief negotiator, stated that Respondent was able to grant a pay raise, and did not intend to plead poverty as a defense. At the third bargaining meeting, Respondent submitted a proposal which included the fringe benefits that it currently provided employees. As to wages, the proposal stated "the employer's wage proposal will be forthcoming."

The parties next met a week later, on 17 and 18 March, at which time the Union submitted a counterproposal. On 18 March the Union drafted a comprehensive wage and fringe benefit proposal which it read to Respondent's representatives. Respondent requested the proposal submitted in written form, which was done on 1 April. The parties discussed Respondent's incentive pay plan, which had been instituted in September 1979, and the

[1] The General Counsel and the Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Respondent renews the contention, made to the Administrative Law Judge, that this proceeding should be dismissed because the complaints do not allege Respondent violated the Act with respect to the ILGWU (the Union) but only with respect to the Charging Party. Respondent claims that the Charging Party was not delegated the authority to negotiate or execute a contract on behalf of the certified Union, and thus Respondent did not violate the Act by failing to bargain with the Charging Party. The Administrative Law Judge permitted the General Counsel to amend the complaint in Case 20-CA-15493 to allege that the Union delegated negotiating authority to the Charging Party. Because he dismissed the complaint in its entirety, the Administrative Law Judge found it unnecessary to decide the "agency status" of the Charging Party. The record reflects that the question of whether the Charging Party or the Union was going to sign any contract reached by the parties was a question which concerned Respondent. It is clear that negotiators for the Charging Party preferred that the Charging Party, and not the Union, sign any agreed-upon contract. It is equally clear that Respondent continued to negotiate with the representatives who arrived to bargain with it. Anderson, a lead negotiator for the Charging Party, acknowledged at one point that he knew he could not bargain to the point of impasse over the demand that the Charging Party, and not the Union, be the signatory to the contract. Also, one of the negotiators was a vice president of the Union and, at the hearing, testified that she could sign contracts on behalf of the Union. Based on the foregoing and the record as a whole, we cannot agree with Respondent's contention that the case should be dismissed because the Charging Party attempted to obtain its name, and not that of the Union, as signatory to the contract.

[3] All dates hereinafter are in 1980 unless otherwise indicated

Union indicated that, although it did not understand the plan, it would go along with it for a year.

At the 17 March meeting Mason claimed that Respondent's ability to respond on economic issues was limited by its history and the seasonality of its business. Mason again informed the Union that Respondent was unable to increase its labor costs until its September increase of customer prices. Mason also explained that a wage offer could not be forthcoming because the Company was entering a slow period and it had been required to lay off employees. In sum, Mason stated that Respondent "normally" did not make pricing or labor decisions until August and thus it would be hard for it to "come up with a meaningful response on economics during the next few months."

Respondent maintained this position throughout April, and reiterated it on 6 May when a Federal mediator began attending negotiation sessions. At that 6 May session, Mason, when asked if Respondent was offering "nothing at this time," replied, "no [Respondent is], stating that there will be no wage proposal until September." On 9 June, and again on 16 June when negotiations were suspended, Respondent reiterated to the Union that it did not increase wages until September. At the 20 August bargaining session, the first session after 16 June, Respondent presented its economic proposal on wages.

The Administrative Law Judge concluded that Respondent did not refuse to bargain within the meaning of Section 8(a)(5) and (1) of the Act by failing and refusing to make a wage counterproposal for over 4 months. In so deciding, the Administrative Law Judge determined that Respondent's delay was justified by legitimate business reasons; i.e., its busy season did not start until September, its business was depressed, and it could not formulate labor costs until its next scheduled increase in prices, which also was in September. Therefore, the Administrative Law Judge concluded that the General Counsel had not sustained the burden of proving an unfair labor practice. We disagree.

We note at the outset that the General Counsel has not alleged overall bad-faith or surface bargaining. However, wages are a mandatory subject of bargaining, and indeed are "perhaps the most important element of the many in the employment relationship . . . ."[4] Here, the Union made its initial economic proposal in March, and Respondent from that time until August adhered to its bargaining position that it had a "limited ability" to respond on economic matters because it could not increase its labor costs until September.[5] The facts belie Respondent's position and the Administrative Law Judge's finding thereon.

First, it must be noted that, as early as February, Respondent specifically disavowed a plea of poverty and, indeed, stated it could grant a pay raise. In May, Respondent told the Federal mediator that it was not pleading inability to pay. Although Respondent at this time mentioned a depression in the industry and the recent layoff of a number of bargaining unit employees, Respondent also stated that it could borrow money or lower its profit margin to make an economic proposal. Further, Respondent's history of wage increases reveals a pattern different from that steadfastly claimed by Respondent during negotiations. Thus, the record indicates that Respondent granted wage increases in March and September 1978 and 1979. While it may be true that Respondent did not grant wage increases unless it raised customer prices, the record also shows that such price adjustments were not limited only to September. Indeed, the Administrative Law Judge found that, on or about 1 February, at the start of negotiations, Respondent raised its prices. The Administrative Law Judge attached no importance to this finding, since he did not believe an adverse inference should be drawn from Respondent's failure to use the money from the February price increase to make a counterproposal on wages. The significance of this finding has little to do with the financial aspects of the February increase—Respondent, in fact, 2 weeks later told the Union it would not plead poverty—but rather indicates that Respondent's emphasis on the need to wait until it raised prices in September before making a wage proposal was misleading. Indeed, the record establishes that Respondent adjusted its prices in March and October 1978, and in March, September, and November 1979.[6]

[4] *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973).

[5] The contention made by the dissent that the Union was not "overly troubled" by Respondent's delay in making a wage proposal is not reflected by the facts. It is true that by the seventh time the parties discussed economic issues--or, more precisely, Respondent's failure to make a wage proposal--the Union had explored alternative methods of resolving the issue. A month before this occurrence, however, Anderson, the Union's attorney, had requested Mason to make a wage proposal because the Union "*had* to have" one (emphasis supplied). Anderson also indicated another time that Respondent's failure to make a wage proposal had severely limited the ability of the Union to bargain. In meetings both before and after the May proposal seized on by the dissent, the Union raised the issue of wages and attempted to secure a proposal from Respondent. Thus, the suggestion that the Union was not sincerely concerned about the matter is inapt.

[6] Although Respondent changed its method of payment to employees in September 1979, it does not contend that it had to wait a full year to see the effects of that change before it could assess its economic proposals.

The dissent asserts that Respondent's vice president testified that Respondent "usually" made price increases in February or March, and then again in September. The above facts indicate that such a practice of in-

Continued

Given this record, we cannot but conclude that Respondent failed to make a timely wage offer in violation of Section 8(a)(5) and (1) of the Act. Respondent's delay in tendering a wage offer clearly frustrated bargaining and its position amounted to no less than a refusal to bargain under the facts of this case.[7]

2. On 13 June, in a telephone call, the Union requested Respondent to furnish it with the names and rates of pay of supervisors who were doing unit work. Respondent's vice president checked with the supervisors, who stated that they wanted individual rates kept confidential. On 16 June Respondent told the Union of this fact, and also that it did not believe the information was relevant for collective-bargaining purposes. The Union maintained that the information was relevant because it related to the issue of Respondent's refusal to make a wage offer and to layoffs. By letter dated 16 July, Respondent reiterated its position, and offered to provide the information if the Union could demonstrate relevance.

When the parties next met, on 20 August, the Union again requested the names and rates of pay of the supervisors. Mason offered to provide the information if the Union agreed not to show it to employee members of the negotiating team. In the alternative, Mason said he would provide the average hourly rate of the supervisors. On 23 August the Union rejected these proposals, and requested further information on the benefits given supervisors. At the 4 September meeting, Mason provided the Union with the average hourly wage rates and benefit information for supervisors. The Union said nothing to Mason about the nature of the information given.

We agree with the Administrative Law Judge that Respondent did not violate the Act by failing to furnish wage and benefit information about its supervisors in the manner sought by the Union. Assuming *arguendo* that Respondent had the duty to provide the information requested,[8] we conclude that Respondent satisfied that duty here. The Union's stated purpose for obtaining the supervisors' wage and benefits rates was to demonstrate to Respondent that the wages for supervisors who performed unit work were higher than the wages received by unit employees and were higher than the wages for unit employees proposed by the Union, in negotiations. However, the Union never explained to Respondent why it needed the names of individual supervisors along with their individual rates. Further, the Union did not complain after it received the information in the form provided by Respondent. Since the individual supervisors are nonunit employees who are not represented by the Union, we do not believe it was inappropriate for Respondent to decline to disclose the individual wage rates of the supervisors. We agree with the Administrative Law Judge that Respondent's offer, and the ultimate form in which it provided the information, satisfied Respondent's obligation under the Act.[9]

II. THE STRIKE AND LATER UNFAIR LABOR PRACTICES

As fully explained by the Administrative Law Judge, unit employees began a strike against Respondent on 25 August. The strike was still in progress at the time of the hearing. Since the Administrative Law Judge concluded that Respondent had not violated the Act before the employees struck, he also concluded that the strike was not an unfair labor practice at its inception. However, we have found *supra* that Respondent violated Section 8(a)(5) and (1) of the Act by failing to make a wage counterproposal. Therefore, we must decide whether this unfair labor practice was, in part, responsible for causing the strike for, if so, then the strike was an unfair labor practice strike at its inception.[10] We find, however, that the strike was not an unfair labor practice strike at its inception.

The Union held meetings with the employees to brief them on the negotiations on 7, 21, and 23 August. At each session, the wage proposal issue and Respondent's failure to provide information were discussed. However, between the 7 August and 21 August meetings, Respondent submitted its economic wage proposal. The union representatives discussed the proposal with the employees at the 21 August meeting. Some employees indicated they were upset with the proposal because it maintained Respondent's merit wage system rather than incorporating the Union's proposed across-the-board increases. Employees also indicated displeasure with Respondent's failure to provide the requested data on supervisor wages. Employees also expressed the belief that Respondent was trying to stall on negotiations, since the next scheduled negotiating session had been set for 2 September. At the

creases was less than set. More importantly, these "practices" were never made known to the Union. In at least 7 of the 12 meetings between the parties before a wage proposal was made, Mason emphasized that a wage proposal could not be forthcoming because Respondent did not increase prices until September. Only once in this period did Respondent indicate a less stringent policy. In essence, Respondent portrayed that it could only raise prices in September. By so finding, we have not misstated Respondent's practices, but simply accorded the weight Respondent itself assigned to the emphasis on the September limitation on raising prices.

[7] Cf. *Clear Pine Mouldings*, 238 NLRB 69 (1978), enfd. 632 F.2d 721 (9th Cir. 1980).

[8] Compare *Amphlett Printing Co.*, 258 NLRB 86 (1981).

[9] *Id.* at 86.

[10] See, e.g., *Tufts Brothers*, 235 NLRB 808 (1978).

strike vote meeting on 23 August, the same issues were discussed. Union agents mentioned the unfair labor practice charges earlier filed with the Regional Office and the proposed settlement agreement sent by the Regional Office to Respondent.[11] The employees in attendance unanimously voted to strike, and the strike began on 25 August.

Based on the foregoing, we conclude that Respondent's unlawful delay in submitting its economic counterproposal was not a cause of the strike. We have already determined that Respondent did not violate the Act by failing to provide the individual wage rates of its supervisors to the Union. Furthermore, Respondent submitted its wage proposal on 20 August, the first date bargaining resumed after it had broken off on 16 June. Thus, by the 21 August meeting and the 23 August strike vote, the Union and the employees had received the proposal which they had sought. By tendering this offer, Respondent finally met its bargaining obligation. Furthermore, there is no allegation in this case that Respondent engaged in overall dilatory or surface bargaining, and we agree with the Administrative Law Judge's conclusion that the record would not support a finding of such conduct. Thus, the strike was not an unfair labor practice strike at its inception.[12]

This finding does not end our inquiry, however, because the General Counsel and the Union have also argued that Respondent's withdrawal of recognition from the Union on 16 December was an unfair labor practice and thereby *converted* the strike into an unfair labor practice strike. The Administrative Law Judge found that Respondent had a good-faith doubt of the majority status of the Union which privileged its withdrawal of recognition. We find it unnecessary to pass on the Administrative Law Judge's analysis of Respondent's alleged basis for its good-faith doubt, because we believe the withdrawal of recognition was improper for a reason not addressed by the Administrative Law Judge.

The Union was certified on 29 November 1979. It is axiomatic that absent unusual circumstances an employer must honor a union's certification for a "reasonable period," usually 1 year.[13] Further, when an employer's refusal to bargain during the certification year deprives a union of the 12 months of good-faith bargaining to which it is entitled, the Board has long held that the certification year is extended to remedy the unfair labor practice.[14] In the instant case, the General Counsel requested that the certification year be extended because of Respondent's refusal to bargain. We agree that Respondent's failure to make a wage counterproposal for approximately 4-1/2 months warrants the extension of the certification year for at least a similar period of time.[15] Thus, the certification year extended beyond the 29 November 1980 anniversary date, and the Union was entitled to at least 4-1/2 months of bargaining from that date. It follows therefore that Respondent's withdrawal of recognition and refusal to bargain on 16 December, during the extended certified year, was a *prima facie* violation of the Act. Accordingly, the circumstances relied on by the Administrative Law Judge in concluding that Respondent had an objective good-faith doubt of the Union's majority status could not justify a withdrawal of recognition and refusal to bargain during the certification year. Thus, as of 16 December, the strike against Respondent was converted into an unfair labor practice strike.[16] The striking employees are therefore entitled to reinstatement upon their unconditional offer to return to work.[17]

CONCLUSIONS OF LAW

1. Respondent Whisper Soft Mills, Inc., is an employer engaged in commerce and is an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Ladies Garment Workers Union, AFL-CIO, and Pacific Northwest District Council, International Ladies Garment Workers Union, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

[11] The proposed settlement agreement would have required Respondent not to engage in surface bargaining or refuse to furnish information on the supervisors performing unit work. Also, it stated Respondent would bargain in good faith, and the certification year would be extended.

[12] Member Jenkins disagrees with the conclusion that Respondent's unfair labor practice was not a cause of the strike. In his opinion, the fact that an unfair labor practice is not current with the start of a strike does not mean that the unfair labor practice did not contribute to the strike. Here, the delay in Respondent's wage proposal was part and parcel of the unfair labor practice, and contributed to the decision to engage in a strike. Thus, Member Jenkins would find the strike was an unfair labor practice strike from its inception.

[13] *Ray Brooks v. NLRB*, 348 U.S. 96 (1954).

[14] *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

[15] Cf. *Federal Pacific Electric Co.*, 215 NLRB 861 (1974); *Haymarket Bookbinders*, 183 NLRB 121 (1970); *Mar-Jac Poultry, supra.*

[16] See, e.g., *Windham Community Memorial Hospital*, 230 NLRB 1070, 1074 (1977); *Pennco, Inc.*, 242 NLRB 467, 469 (1979). It is beyond dispute that one of the Union's negotiation topics was ending the strike. The Union also desired to continue to represent employees, as indicated by its 10 December letter requesting certain information. We are satisfied that Respondent's unlawful withdrawal of recognition and refusal to bargain was at least in part a cause for the continuance of the strike.

[17] Respondent concedes that, if its withdrawal of recognition was unlawful, its failure to provide certain information the Union sought on striker replacements was also unlawful. We so find. However, we are unwilling to rule at this time that the striking employees are now entitled to reinstatement. There is no evidence as to whether they made an unconditional offer to return to work after 16 December, and we are unable to conclude at this time whether such an offer would have been futile.

3. The following unit is now, and has been at all times material, an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All production employees, including cutters, sewing machine operators and mechanics, shippers, and warehouse employees, employed by Respondent at its Santa Rosa, California facility, excluding all office clerical employees, guards and supervisors as defined in the Act.

4. International Ladies Garment Workers Union, AFL-CIO, has been the exclusive bargaining representative of Respondent's employees in the above-described bargaining unit since 29 November 1979, when it was certified as such, and continues to remain such representative for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of those employees.

5. By failing and refusing to make a wage counterproposal in March, April, May, and June 1980, Respondent refused to meet its obligation to bargain collectively with International Ladies Garment Workers Union, AFL-CIO, with respect to wages, hours, and other terms and conditions of employment and thereby violated Section 8(a)(5) and (1) of the Act.

6. By withdrawing recognition on 16 December 1980, and by refusing to reorganize or bargain with International Ladies Garment Workers Union, AFL-CIO, since that date, Respondent has violated Section 8(a)(5) and (1) of the Act.

7. By refusing to supply International Ladies Garment Workers Union, AFL-CIO, with requested information concerning bargaining employees hired by Respondent, Respondent has violated Section 8(a)(5) and (1) of the Act.

8. The strike which commenced on 25 August 1980 was converted to an unfair labor practice strike on 16 December 1980, the date Respondent unlawfully withdrew recognition and refused to bargain with International Ladies Garment Workers Union, AFL-CIO.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action which we find necessary to effectuate the policies of the Act.

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, recognize and bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit. We also shall order Respondent not to delay in making wage counterproposals. We additionally shall order Respondent to furnish the Union with information on new unit employees as requested by the Union.

Having found that Respondent's refusal to bargain with the Union converted the strike to an unfair labor practice strike on 16 December 1980, we shall order that all striking employees who were not permanently replaced before that date be reinstated, upon their unconditional request, to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, discharging, if necessary, any replacements hired after 16 December 1980, and that it make whole such employees for any loss of earnings resulting from its failure to reinstate them within 5 days of their unconditional request, with interest thereon to be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).[18] If Respondent herein has already rejected, or hereafter rejects, unduly delays, or ignores any unconditional offer to return to work or attaches unlawful conditions to its offer of reinstatement, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work.[19] Such employees for whom no employment is immediately available shall be placed on a preferential hiring list for employment as positions become available and before other persons are hired for such work. Priority for placement on such list is to be determined by seniority or some other nondiscriminatory test.[20]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Whisper Soft Mills, Inc., Santa Rosa, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with International Ladies Garment Workers Union, AFL-CIO, as the exclusive bargaining rep-

[18] See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962). While Member Jenkins has expressed the view, in dissent, that he would no longer require this 5-day grace period but would, with certain limitations, require an employer to reinstate unfair labor practice strikers upon application for reinstatement, he acknowledges that until such time as the majority view approving this practice changes, he is institutionally bound by this position. See *Drug Package Co.*, 228 NLRB 108 (1977).

[19] See *Newport News Shipbuilding Co.*, 236 NLRB 1637 (1978).

[20] *Cutten Supermarket*, 220 NLRB 507 (1975).

resentative of the employees in the following appropriate unit:

> All production employees, including cutters, sewing machine operators and mechanics, shippers, and warehouse employees, employed by Respondent at its Santa Rosa, California, facility; excluding all office clerical employees, guards, and supervisors as defined in the Act.

(b) Failing and refusing to make a timely wage counterproposal.

(c) Refusing to furnish the Union with information requested on bargaining unit employees hired by Respondent.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which we find necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively in good faith with International Ladies Garment Workers Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described above, concerning rates of pay, wages, hours, or other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

(b) Make timely wage counterproposals.

(c) Furnish the Union with information on bargaining unit employees hired by Respondent, as requested by the Union.

(d) Reinstate, upon unconditional request, all strikers who were not permanently replaced before 16 December 1980 to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after 16 December 1980; and make such employees whole for any loss of earnings resulting from its failure to reinstate them within 5 days of their unconditional request in the manner set forth in the section of this Decision entitled "The Remedy." Such employees for whom no employment is available shall be placed on a preferential hiring list based upon seniority, or some other nondiscriminatory test, for employment as jobs become available.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its place of business in Santa Rosa, California, copies of the attached notice marked "Appendix."[21] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

CHAIRMAN DOTSON, dissenting:

Contrary to my colleagues, I would adopt the Administrative Law Judge's finding that Respondent did not violate Section 8(a)(5) and (1) of the Act by failing to submit to the Union a wage proposal for 4-1/2 months, and would adopt his dismissal of the complaint in its entirety. I agree with the Administrative Law Judge that the facts of this case clearly support the conclusion that Respondent's delay in making its wage proposal was based on legitimate business concerns which rendered it impossible to negotiate meaningfully over wage increases during that period of time.

Contract negotiations between Respondent and the Union began in January 1980. At negotiating sessions from March through June, when economic topics were addressed, Respondent's representative, Mason, made it clear that the Company could not respond to the Union's wage proposal for the next few months, but emphasized that it definitely intended to raise wages even if it meant borrowing the money or lowering its profit margin in order to do so. Mason repeatedly explained throughout this period that the Company would not know how much it could increase labor costs until September, when an increase in its prices was scheduled, and that the Company normally increased wages when it raised prices. In addition, Respondent noted that the period from March through June was its slow season, with the industry being in a particularly depressed state which had necessitated the layoff of an unprecedented number of employees. By contrast, August was the beginning of the busy season when the Company would be in the position to dis-

[21] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

cuss economic issues, and to seriously bargain about pay raises. Meanwhile, negotiations proceeded with some success in other areas, and there was no allegation of bad-faith or surface bargaining.

Ironically, there is even evidence that the Union was not overly troubled by the prospect of delay. At the 6 May bargaining session, Union Representative Anderson suggested a reopener to the wage issue, and Mason responded that the Company would sign a contract with a reopener for wage negotiations in September, or recess negotiations until September depending on the Union's preference. Although this proposal was apparently dropped, the very fact that it was made casts a questionable light on the motives underlying the Union's strenuous objections to the delay.

Respondent's failure to present a concrete wage offer during the early negotiations was not indicative of an attempt to avoid reaching an agreement, but was a reasonable result of the fact that the subject of wages was too uncertain to be seriously discussed at that time. For example, at the 16 June bargaining session, when pressed by the Union for a proposal, Mason stated that he "could come up with something, but it would not be meaningful in terms of being anywhere close to a bottom line in terms of where the company could go." Clearly, Respondent was willing to bargain over wages, but was candid enough to admit that it could not do so with any degree of confidence until September.

My colleagues, however, point to an apparent inconsistency in Respondent's past business practices to support their view that Respondent failed to make a timely wage offer. The majority emphasizes that Respondent falsely asserted that, in the past, price increases had been limited to the month of September, and therefore they reject the argument that business reasons necessitated the delay. However, Respondent never stated that it only raised prices in September. To the contrary, Respondent's vice president, Lyons, said at the hearing that Respondent usually made product price increases during February or March and then again in September. Nor did Respondent represent that it always raised wages when it raised prices, but only that it normally increased employees' wages and fringe benefits when it increased its customers' prices, and that it could not raise wages without raising prices. It is uncontroverted that the next price increase was scheduled for September. As to the majority's assertion that Respondent adjusted wages in March and September of 1978 and 1979, the record shows that only the March 1978 and the two September increases were across the board. Other wage increases, including March 1979, were either individual merit increases or raises pursuant to Respondent's policy of giving new hires an increase after 30, 60, and 90 days. As found by the Administrative Law Judge, in 1978 and 1979 wage and price increases were given contemporaneously. Furthermore, Respondent acknowledged that it raised prices in February 1980, but contends that because of its serious financial difficulties it could not afford a substantial wage increase until September. Indeed, the Administrative Law Judge found that the General Counsel had not met his burden of proving that the February price increase provided Respondent with the ability to make a serious wage offer before its business picked up in September.

Based on the foregoing I find that Respondent approached the negotiations with a willingness to bargain and that it did bargain with the Union to the best of its ability, but that serious economic factors forced it to delay making a constructive wage proposal for several months. There is no record evidence to support insinuations that Respondent was not bargaining in good faith when it explained the reasons why it was not in a position to know exactly what kind of wage increase it could offer until September. Nor does the record support arguments that Respondent misrepresented its past practice of increasing wages and prices. For these reasons, I respectfully dissent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to recognize and bargain collectively with International Ladies Garment Workers Union, AFL–CIO, as the exclusive bargaining representative of the employees in the following appropriate bargaining unit:

All production employees, including cutters, sewing machine operators and mechanics, shippers, and warehouse employees, employed by Respondent at its Santa Rose, California facility; excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to make a timely wage counterproposal.

WE WILL NOT refuse to furnish the Union with information on bargaining unit employees hired by Respondent, as requested by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employ-

ees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain collectively in good faith with International Ladies Garment Workers Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described above, concerning rates of pay, wages, hours, or other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

WE WILL make timely wage counterproposals.

WE WILL provide the Union with information on newly hired bargaining unit employees, as requested by the Union.

WE WILL reinstate, upon unconditional request, all strikers who were not permanently replaced before 16 December 1980 to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after 16 December 1980, and make such employees whole for any loss of earnings resulting from our failure to reinstate them within 5 days of their unconditional request, with interest. WE WILL place employees for whom no employment is available on a preferential hiring list based upon seniority or some other nondiscriminatory test, for employment as jobs become available.

WHISPER SOFT MILLS, INC.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: The consolidated hearing in Cases 20-CA-15493 and 20-CA-15672 on January 6 and 7, 1981, was based on unfair labor practice charges filed by Pacific Northwest District Council, International Ladies Garment Workers Union, AFL-CIO,[1] herein called the Council, and upon separate complaints issued by the General Counsel of the National Labor Relations Board[2] alleging that Whisper Soft Mills, Inc., herein called Respondent, was engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, herein called the Act. Respondent filed answers to the complaints denying the commission of the alleged unfair labor practices.[3]

Upon the entire record,[4] from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Questions Presented for Decision*

On November 29, 1979, the ILGWU was certified by the Board as the exclusive bargaining representative of Respondent's production employees. On January 15, 1980, Respondent and the Union began contract negotiations.[5] The Union was represented during the negotiations by John Anderson who was its attorney and chief negotiator; Mattie Jackson who was an ILGWU vice president and manager of the Council; and Ellen Wiegger, an ILGWU organizer. Respondent was represented by Stefan Mason who was its chief negotiator and attorney for labor matters and by Minner Lyons its vice president in charge of manufacturing. The parties held 12 bargaining sessions between January 15 and August 20. On August 25 the Union commenced a strike against Respondent. The parties resumed bargaining for six more sessions between September 2 and November 14, but no agreement was reached.

The complaint as amended in Case 20-CA-15493 alleges that Respondent failed to bargain in good faith within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act by its conduct during the contract negotiations, as follows: "During the months of March, April, May and June Respondent failed and refused to make a wage counterproposals." "Since on or about June 16 Respondent has failed and refused to furnish the union with

[1] The charge in Case 20-CA-15493 was filed July 16, 1980, and the one in Case 20-CA-15672 was filed September 16, 1980.

[2] The complaint in Case 20-CA-15493 issued August 22, 1980, and was amended December 24, 1980, and again on January 7, 1981, at the close of the hearing. The complaint in Case 20-CA-15672 issued October 31, 1980. An order consolidating these cases for hearing issued October 31, 1980.

[3] Respondent admits it is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and meets the Board's applicable discretionary jurisdictional standard. Likewise Respondent admits that the two unions involved herein, the Council and the International Ladies Garment Workers Union, AFL-CIO, herein called the ILGWU, are labor organizations within the meaning of Sec. 2(5) of the Act.

[4] The complaints herein as initially drafted allege that the Council is the exclusive bargaining agent of the employees involved and that Respondent violated Sec. 8(a)(5) by refusing to bargain in good faith with the Council. It is undisputed that the ILGWU, not the Council, is the exclusive bargaining representative of the employees. Respondent at the outset of the hearing filed a motion to dismiss on the ground that the complaints are defective because they allege that the Council, rather than the ILGWU, is the exclusive bargaining agent of the employees and alleged that Respondent violated the Act by refusing to bargain with the Council. I reserved ruling upon this motion. The General Counsel at the conclusion of the hearing amended the complaint in Case 20-CA-15493 to allege that the Council and ILGWU were the exclusive bargaining agents of the employees involved and that the Council had been delegated the authority to negotiate collective-bargaining agreements within its geographical boundaries on behalf of the ILGWU. I permitted this amendment, over Respondent's objection, because the parties from the outset of the hearing were on notice that the agency status of the Council was an issue in the case and were fully afforded an opportunity to litigate that issue. Thus, since the amendment has cured the defect in the pleadings I shall deny Respondent's motion to dismiss.

[5] I have used the neutral term "union" rather than Council or ILGWU inasmuch as there is a dispute in this proceeding over which labor union was conducting the negotiations. I note that in view of my disposition of the issues herein I have not resolved the question of the Council's agency status.

the rates of pay and benefits paid to supervisors who performed work normally performed by employees in the unit [represented by ILGWU]." "Since on or about December 16 Respondent has failed and refused to furnish the union with names, addresses, job classifications, wage rates and wage rate changes, dates of hires, dates of termination of each employee hired by Respondent since August 25 [the date the strike commenced]."

The complaint in Case 20-CA-15672 alleges that the strike which began on August 25 was caused and/or prolonged by Respondent's unfair labor practices alleged in Case 20-CA-15493; namely, its alleged refusal to make a wage counterproposal, its refusal to furnish the Union with the rates of pay and benefits paid supervisors, and its refusal to furnish the striker replacement information. The complaint also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by permanently replacing and refusing to reinstate the strikers and violated Section 8(a)(5) of the Act by refusing the Union's request that it immediately reinstate the strikers.

B. *The Evidence: A Chronology*

The January 15 Bargaining Session

Nothing of substance was discussed at the first negotiation meeting held on January 15. Respondent's negotiators outlined the Company's general practices, and the Union's negotiators asked for information pertaining to employees' wage rates and fringe benefits. This information was eventually turned over to them.

On February 8 Mason wrote Anderson and requested, among other things, copies of the constitutions and bylaws of the ILGWU and the Council and the most recently filed LM-2 forms of the ILGWU and the Council. On February 11 Jackson supplied Mason with the 1978 LM-2 forms submitted on behalf of the San Francisco Joint Board and Local 101, both affiliates of the ILGWU.

The February 20 Bargaining Session

The second negotiation session was held February 20 at which time the Union presented its noneconomic proposals. Respondent's negotiators indicated they would consider the proposals and respond to them in writing. The Union had not formulated an economic proposal and the parties agreed that for the first few negotiation sessions they would try to reach agreement on noneconomic matters before dealing with economic matters.

On the subject of wages, Mason stated that the Company has instituted an incentive pay system in September 1979 and explained, at this and subsequent meetings, that the Company's policy was to grant wage increases in September which was when it raised its customer's prices. Mason emphasized that Respondent did not intend to plead poverty and that, quite the opposite, Respondent was able to grant a pay raise.

The preamble of the Union's proposal stated that the agreement was between Respondent and the ILGWU and its affiliates, the Council and Local 215. The proposed recognition clause provided that Respondent recognize these three unions as the employees' exclusive bargaining representative and the proposed signatory page provided that the agreement be signed by Jackson on behalf of the Council. With regard to these provisions, Mason stated that the Company had a problem dealing with any entity other than the ILGWU since it was the certified bargaining representative. Mason advised Anderson that Respondent wanted the ILGWU to be bound by any contract reached by the parties. Anderson replied that he had a problem with making the ILGWU the signatory to the agreement and after some futher discussion about the matter the parties agreed to put it on "hold."

The March 11 Bargaining Session

At the third bargaining session on March 11, Respondent submitted a proposal which incorporated the Union's noneconomic proposals which were acceptable to Respondent, plus items proposed by Respondent. This package was reviewed and discussed by the negotiators who reached agreement on several of the items.

Included in Respondent's proposal were the fringe benefits currently enjoyed by the unit employees. On the subject of wages the proposal stated "the employer's wage proposal will be forthcoming."

The preamble of Respondent's proposal stated in substance that the agreement would be between Respondent and the ILGWU and the signatory page provided for Jackson's signature on behalf of the ILGWU. The recognition clause provided that Respondent recognized the ILGWU as the employees' bargaining representative. Anderson asked why Respondent had made the ILGWU the signatory to the agreement. Mason answered that the ILGWU was the certified bargaining representative. Mason asked that Jackson sign any agreement reached by the parties as vice president of the ILGWU and obtain a letter from the ILGWU authorizing her to negotiate for that union and binding it to the agreement. There was no response from the Union's negotiator.

The March 17 and 18 Bargaining Sessions

At the next negotiation meetings held on March 17 and 18 the Union made a counterproposal to the Company's March 11 proposal. The negotiators discussed this proposal on March 17 as well as on March 18 and reached agreement on several sections.

The Union's March 17 proposal did not contain a signatory page and its preamble provided that the agreement was between Respondent, the Council, and Local 215, affiliates of the ILGWU. The recognition clause stated in substance that Respondent was obligated to recognize the Council and Local 215 as the employees' exclusive bargaining representatives. Anderson stated that the ILGWU did not want to be a party to the agreement because it wanted to be insulated from liability. Mason indicated that this created legal problems for Respondent because the ILGWU was the certified bargaining representative. Mason asked if the ILGWU was represented at the negotiations. Anderson replied that, "if the union [referring to the Council] must take a counterproposal which includes the International, they will then represent the International." Mason asked, "You mean you don't represent the International until then." Anderson was

silent, whereupon Mason caucused with the Company's other negotiators to determine whether to continue bargaining. When they rejoined the Union's negotiating committee, Mason stated the Company desired to continue to negotiate in order to get the agreement out of the way. Mason told Anderson that Respondent would continue negotiating under the assumption that it was "dealing with a representative of the union that is certified" and warned Anderson that there might be legal problems if the parties were unable to reach agreement on that subject.

Toward the end of the March 18 bargaining session, union negotiators Anderson and Jackson caucused and drafted a comprehensive wage and fringe benefit proposal which Anderson read verbatim to Mason. In substance Anderson proposed, among other things, that during the term of a 3-year contract the Company grant an immediate 50-cent-an-hour across-the-board increase for all unit employees and reopen the contract for wage and fringe benefit negotiations during the second and third years, make no change in the established incentive rates or standards without consulting the Union, maintain specific minimum wages for the different job classifications, contribute into the ILGWU's health, welfare, and pension trusts on behalf of the unit employees, and drop the employees from the Company's profit-sharing program. Mason stated that since this proposal was a lengthy one he needed time to consider it and asked that the Union reduce it to writing and to submit copies of the various trust funds to which it was proposing that Respondent make contributions.[6]

There was some discussion, however, about the Company's incentive program and the Company's ability to make a proposal on wages and other major fringe benefit items. The union negotiators stated that they were unable to make any sense out of the Company's recently instituted incentive program since it differed from the usual plans of that kind found in the garment industry but that the Union would go along with the current plan for 1 year and indicated it favored a provision guaranteeing that those workers doing incentive work would get 25 percent above the minimum hourly rates established by the contract.[7]

On the subject of Respondent's ability to respond to the Union's economic proposals, Mason indicated that Respondent had a limited ability to respond on economics. He explained the history of the Company; in particular, the seasonality of its business and the fact that the Company was unable to increase its labor costs until September when it increased its customers' prices and that Respondent normally increased employees' wages and fringe benefits when it increased its customers' prices. Mason, in explaining why the Company at that time could not make a wage offer, also noted that business was entering into a very slow period and that the Company had been forced to lay off an unprecedented large number of workers. Mason concluded these remarks with the statement that "the company normally would not make decisions on pricing and increases in labor costs until August, and that it would be very difficult for the Company to come up with a meaningful response on economics during the next few months."

The April 3 Bargaining Session

At the next bargaining session held on April 3, Respondent only responded to the bereavement and vacation pay aspects of the Union's March 18 economic proposal. The parties agreed to the Union's vacation proposal which incorporated the Company's existing practice and also agreed to provisions involving injury and bereavement pay and two other noneconomic items. The Union's incentive pay proposal was also discussed with Respondent objecting to it on the ground that it would require it to pay employees at 25 percent above their classification rate regardless of whether they worked at an incentive rate. On the subject of wages, Anderson asked Respondent to make a wage proposal. Mason replied that Respondent was "trying to do whatever it could to respond [on] economics, even though there were many business reasons for not being able to show a lot of movement at that period of time," and he repeated the reasons he had given at previous negotiation sessions for the Company's inability to make a wage proposal at that time. Anderson ended the meeting by stating that he had to have a wage proposal from the Company.

The April 16 Conversation Between Mason and Anderson[8]

On April 16 Mason phoned Anderson to reschedule the next negotiation meeting and they discussed, among other things, the Company's position on wages and other major economic matters. Mason reiterated the reasons he had expressed earlier for the Company's "inability to make a meaningful response on economics." He emphasized the Company's inability to increase customers' prices until September. Anderson stated that the Union had no problem with postponing, or might postpone, the Union's proposed wage increases until September, but that "he did not want to negotiate until September and that he did desire to see something on economics [from the Company] to see where we were headed."

The April 22 Bargaining Session

At the seventh bargaining session held on April 22, which was scheduled to last for 2 days, the Union proposed a new contract proposal which incorporated language already agreed to, language already previously proposed, and new and modified proposals.[9] The parties reached agreement on several items previously in dispute. Respondent for the first time advised the Union that the Union's request for a union-security agreement was a strike issue for the Company because the Company had philosophical objections to requiring employees

[6] On April 1 Anderson mailed Mason a written draft of the Union's March 18 economic proposal.

[7] The record reveals that the great majority of the unit employees were incentive workers.

[8] The description of this conversation is based on a composite of Mason's and Anderson's testimony which is not inconsistent.

[9] There was no change from the Union's previous proposal with regards to the preamble and recognition clause and there was no signatory page.

to support any organization as a condition of employment. Toward the end of the session Anderson declared that the negotiations were "really no where" and demanded a wage proposal from the Company. Mason explained the Company's failure to make a wage proposal as he had explained at earlier negotiation meetings. Anderson at this point stated he was canceling the meeting scheduled for the next day because no progress was being made in the negotiations, that Respondent had failed to make a wage proposal, and that since the negotiations were getting nowhere he did not want to meet again unless a Federal mediator was present.

The May 6 Bargaining Session

A Federal mediator was present at the next bargaining session held on May 6 and at each of the bargaining sessions thereafter. At the outset mediator Finley informed Respondent's negotiators that the Union wanted Respondent's economic proposal. Mason stated that Respondent "[was] not in a position to make an offer on economics at that time," explaining that Respondent was unable "to raise labor costs [at that time] because of [its] inability to raise prices until September" and also pointed out that the industry was in a depression and that a substantial number of the unit employees had been laid off. Anderson asked if Mason was stating that Respondent was offering "nothing at this time." Mason replied, "no, what I am stating is that there will be no wage proposal until September." Mason indicated a willingness to continue negotiations on other open issues. Anderson suggested a reopener on wages because of the Union's inexperience with the Company's incentive system. Mason replied that the Company was willing to sign a contract which contained a reopener for wage negotiations in September or was willing to recess negotiations until September, whichever the Union preferred. The parties caucused and while apart mediator Finley asked Mason if Respondent was pleading an inability to pay. Mason answered in the negative. He stated that Respondent could borrow money or lower its profit margins to try to come up with money which would enable it to make an economic proposal. Also discussed was the question of supervisors doing unit work. Anderson asked how many supervisors and unit employees were currently employed. Mason stated that on account of the layoffs there were approximately eight supervisors and eight unit employees working. Anderson stated that there was a question of whether the supervisors were actually supervisors. Anderson took the position that since there was an equal number of supervisors as unit employees that there was an inference the supervisors were doing unit work. Mason stated there might be a legal question as to whether they were unit employees.

Also during this meeting the mediator suggested that if the Company was able to change its position on union security and seniority for layoffs and recall that it might result in movement on the Union's part. Mason replied that union security was a strike issue for the Company but on the issue of seniority for layoff and recall the Company was willing to follow seniority if skill and ability were "relatively equal," rather than "equal" as previously proposed.

Near the end of the meeting the Union, through the mediator, asked that Respondent make counterproposals to the following items which were in dispute: strikes and lockouts; union security; hours of work and overtime; reporting pay; subcontracting; holidays; discharges; savings clause; new machinery; management rights. Mason drafted a written response on each of these items which he transmitted to the Union. A review of the Union's last proposal and Mason's response reveals that the parties were apart on virtually all of these items plus other items. The Union requested additional time to study Mason's response. The meeting recessed and another meeting was scheduled for May 21.

The May 21 Bargaining Session

At the ninth bargaining session held on May 21 Anderson was absent and Mason met with Jackson and the Federal mediator. The parties discussed open issues and agreed on a provision defining the employees' hours of work and another defining overtime work. Mason told Jackson that the Company's vice president in charge of production, Lyons, who had been present at all of the negotiation meetings, had planned a trip to Ireland a year before and would be out of the country for 5 weeks commencing on June 24. Mason stated he thought that the Company's ability to negotiate meaningful would be affected by Lyons' absence.

The June 9 Bargaining Session

At the 10th bargaining session held on June 9, Anderson was absent and Mason met with Jackson and the Federal mediator. Mason informed Jackson that the Company's business was very slow and that there was only a backlog of work for 1 week and that in order to keep the work force intact Respondent wanted to go to a 4-day workweek, as it had done once previously. Jackson stated that in view of the circumstances the Union did not have any objection. The parties then discussed several of the contract matters which had been in dispute, but were unable to resolve any of the disputed items. Regarding the Union's proposal which would prohibit the Company's supervisors from doing unit work, Lyons stated that supervisors had always performed unit work, that the supervisors were the most senior workers who had been promoted from within, and that the Company could not accept a limitation on supervisors doing unit work. And on the subject of the Union's wage proposal Mason again repeated that the Company did not increase its customers' prices until September and wanted "to wait until September to implement increased wages and fringe benefits." There was also a discussion about the Union's proposal regarding incentive wages which resulted in Jackson agreeing to change the language of the union proposal so as to clarify its meaning.

The Union's June 13 Request for Supervisory Information

On or about June 13 Union Representative Wiegger phoned Lyons, the Company's vice president in charge of production, and asked for a list of supervisors and

their salaries. Lyons stated she would check into the matter.

Lyons, on June 13, met with the seven supervisors employed by the Company and told them that the Union had asked for their names and salaries. Each supervisor took the position that they did not want such information revealed because they felt that the amount of money they were paid was their own personal business.

The June 16 Bargaining Session[10]

When the parties met for their 11th bargaining session on June 16 Respondent, as described *supra*, had not made a wage offer and the parties were apart on other significant economic items such as health, welfare, and pensions. In addition they were apart about such significant noneconomic provisions as union security, grievance-arbitration, management rights, no-strike, no-lock out, and the right of the Company to continue using supervisors to do unit work.

Mason reminded the mediator and Anderson that Vice President Lyons would be out of the country visiting Ireland for 5 weeks starting the next week. Mason indicated that he was willing to continue contract negotiations in Lyons' absence but did not believe that Respondent could "come up with" a wage proposal which would be as "meaningful" as one made after Lyons' return. Mason elaborated that Respondent in the past had done its "hard thinking" about increases in employees' wages and benefits in August and that such increases were implemented in September. Mason stated it was very difficult on June 16 for him to propose a meaningful economic offer but that he "could come up with something but it would not be meaningful in terms of being anywhere close to a bottom line in terms of where the Company could go." Mason, in speaking about the Company's inability to come up with a meaningful economic offer at that time, also noted that Respondent currently had a large number of employees on layoff status due to lack of work and that the Company was having inventory, financing, and accounts receivable problems. Mason expressed the opinion that this was perhaps the best time for Respondent to make its "last and final offer" inasmuch as it was the Company's slow season and that the Union would be in a much stronger bargaining position if it waited until August to discuss economic issues because that would be the start of the Company's busy period when it started to hire employees and was the time of the year when the Company would be most vulnerable to economic action. Anderson stated that he did not think wages were really all that important, but that Respondent's failure to make a wage proposal placed the Union in an anomalous bargaining position. Anderson explained that it was impossible for the Union to compromise on other matters until it received a wage offer, that the Union was handicapped due to the Company's failure to make an economic proposal and wanted an economic proposal before negotiating further and stated that the parties might as well recess negotiations and resume at the call of the mediator, and that the Union intended to file refusal-to-bargain charges against Respondent with the National Labor Relations Board.

During this meeting Mason also indicated that Respondent's supervisors had asked that Respondent keep their wages confidential. Mason informed Anderson that based on the supervisor's objection to making the information public and Mason's failure to see its relevance to the negotiations, Respondent was refusing to furnish the Union this information. Anderson argued that if the information showed Respondent paid its supervisors more money than the unit employees then it did not make sense for Respondent to say it was unable to make a wage offer at the time and it also would indicate that it made no sense for Respondent to lay off unit employees and retain the supervisors to perform the unit work. Mason answered that he did not see the relevance of this information because Respondent had always used supervisors to perform unit work especially during the periods when business was slow and employees had been laid off. Mason explained that during such periods supervisors were retained to peform unit work, rather than employees, so that when business improved the Company would be sure to have a staff of experienced supervisors. Also, Mason indicated that while seven supervisors were performing unit work at the present time that all or most of them continued to perform their regular supervisory duties.

The Events Which Took Place Between the June 16 and August 20 Bargaining Sessions

On July 16 the Council filed its unfair labor practice charge in Case 20-CA-15493 alleging that Respondent had violated Section 8(a)(1) and (5) of the Act by refusing and failing to bargain with the ILGWU. On the same date Mason sent a letter to Anderson, without knowledge that the charge had been filed, noting that the negotiations were recessed on June 16 by the Federal mediator subject to call and that Mason had not received a request for a negotiation meeting. Mason asked Anderson to get in touch with him so that Mason could "calendar future negotiation dates." The letter also memoralized the Union's request for supervisory information and that parties' June 16 discussion concerning that matter. In connection with that discussion the letter concludes with the statement: ". . . we assume that the information given to you on June 16, 1980 is sufficient for negotiation purposes. If you feel otherwise and if you can explain the relevancy of more precise information, I would be happy to review this matter again."

On August 7 representatives of the Union met with 15 of the Company's workers for the purpose of bringing

[10] Mason and Anderson testified about this meeting. The bulk of their testimony is not inconsistent and the description herein is based for the most part on a composite of their testimony. But I have rejected Anderson's testimony insofar as he testified that Mason did not indicate that Respondent was willing to make an immediate wage offer which however would not be a meaningful one; did not indicate that Respondent did its hard thinking about wages in August; and that Mason proposed a 3-year contract without a wage reopener. In these respects, where the testimony of Mason and Anderson conflicted, I have relied on Mason's testimony inasmuch as he impressed me as the more reliable witness and had taken contemporaneous notes of the bargaining session.

them up to date about the negotiations.[11] The union agents told the workers, among other things, that despite the requests of the Union that the Union had not received a wage proposal from the Company or information about the supervisors' wages and that the Union had filed unfair labor practice charges against the Company. One employee declared that she thought the employees should strike because of the failure of the negotiations to result in a collective-bargaining agreement. Another employee indicated he approved of the idea of a strike because the Company had laid off employees while retaining supervisors to perform the laid-off employees work. During the discussion which took place about whether the employees should cease work and strike, the employees indicated that they favored strike action because, among other things, they felt the Company was stalling in the contract negotiations and because of the Company's failure to comply with the Union's request for a wage proposal and for information about the supervisors' wages.

On August 15 Mason phoned Anderson and asked that the parties resume negotiations. He stated that Respondent wanted to submit an economic proposal to the Union. They agreed to meet August 20.

Late in August, but several days before August 22, Mason was informed by an agent of the Board's Regional Office that the Union's unfair labor practice charges filed in Case 20-CA-15493 were meritorious and that absent a settlement a complaint against Respondent would be issued.[12]

The August 20 Bargaining Session

At the start of the 12th negotiating meeting held on August 20 Anderson listed the issues which he stated that the Union viewed as "problem areas": "strike and lockout, union security, hours of work and overtime, layoff and recall, contracting and subcontracting, discharge and grievance procedure, the new machinery clause and management rights."

Mason submitted the Company's economic proposal, which in pertinent part offered a wage increase to the unit employees on an individual basis based on merit ranging from nothing for some workers to a maximum of 75 cents an hour for others. Mason also proposed that Respondent maintain its existing health insurance program, which did not cover dependents, but offered to pay 25 percent of the premium cost for employees' dependents effective September 1 and 50 percent effective March 1, 1981. There was no discussion about the Company's economic proposal at this meeting because the Union wanted time to consider it. Mason stated that if an agreement was reached subsequent to September 1 the Company's wage proposal would be retroactive to that date and indicated the Company was talking in terms of a 1-year contract.

Anderson renewed the Union's request for individual wages of the Company's supervisors. Mason offered Anderson two options. Respondent would provide the individual wage data if the Union agreed to keep the information confidential from the employee members of the negotiating committee, or it would provide the average hourly wage rate of the seven supervisors in question. Anderson replied that he would discuss this proposal with Jackson and respond later.

The meeting ended with the parties scheduling another negotiation meeting for September 2 and 3.

The August 21 Employee Meeting

On August 21 the Union held a meeting attended by about 17 of the 27 unit employees to discuss the state of the contract negotiations. Jackson spoke to the employees.[13] She told them the parties had been unable to reach agreement on the terms of a collective-bargaining agreement and that on August 20 Respondent for the first time had presented its economic proposal, but had not given the Union the information it had requested about the supervisors' pay and benefits. Jackson discussed Respondent's August 20 economical proposal and the employees indicated they were dissatisfied with it because it was consistent with the Company's past practice of awarding merit wage increases, rather than across-the-board increases which the Union was proposing. With regard to the supervisors' rates of pay, the employees expressed their concern over Respondent's failure to furnish the Union with the supervisors' individual rates of pay and also stated they were very concerned about the fact that supervisors were performing unit work and thought that it was time something was done about that. Jackson told the employees that the next bargaining session was scheduled for September 2. The employees expressed their dissatisfaction with this date, indicating that they felt negotiations should be resumed sooner. Jackson stated that September 2 was the earliest that the Union had been able to schedule another bargaining session and expressed the point of view that there was a possibility of the parties reaching agreement on the terms of a contract at that time. The employees indicated that they thought Respondent was engaging in stalling tactics in order to avoid reaching an agreement with the Union and asked Jackson what they could do to put pressure on Respondent to reach an agreement. Jackson told them they could either have the Union engage in a consumer boycott or the employees could cease work and strike the Company, but warned that a strike would be very difficult and impose serious economic hardship on the strikers and, in view of this, the employees should seriously consider the matter before deciding to strike. Em-

[11] The description of this meeting herein is based on the uncontradicted testimony of Union Agent Wiegger who impressed me as a credible witness.

[12] As indicated *supra*, the complaint in that case issued August 22 alleging in substance that Respondent had refused to bargain within the meaning of Sec. 8(a)(5) of the Act by refusing to furnish the Union with the rates of pay and benefits paid to supervisors who performed unit work and by failing and refusing to make a wage counterproposal during the months of March and June.

[13] Jackson, for the General Counsel, and employee Wilson, for Respondent, testified about this meeting. The only conflict in their testimony concerned the subject of supervisors' pay. Wilson testified she was unable to remember Jackson mentioning that subject. I have credited Jackson's testimony on this point because she seemed to be the more reliable witness inasmuch as Wilson's memory about what was stated at this meeting was very sketchy and Jackson impressed me as the more credible witness.

ployee Ruiz stated that on or about August 29 Respondent was scheduled to ship a large order of merchandise to K-Mart and that after that date would probably not need the employees and would lay them off and have supervisors do the remaining work as had been its practice in the past. Ruiz stated that he thought that Respondent was stalling the negotiations until the K-Mart order was shipped. Ruiz took the position that the employees should take immediate strike action. The other employees indicated they agreed with Ruiz. Jackson told them that before the Union could authorize a strike the employees would have to hold a strike vote and that such a vote would not be conducted until all of the unit employees were present and that the Union would schedule a strike vote for August 23.

The Employees' August 23 Meeting

The meeting of August 23 was attended by 25 unit employees. Jackson spoke to the employees.[14] Jackson began the meeting by informing the employees that the Union's unfair labor practice charges filed against Respondent in Case 20-CA-15493 based on the Company's failure to make a wage proposal and to furnish certain information to the Union had been found to be meritorious. Jackson showed them a copy of the settlement agreement in that case which the Board had submitted to Respondent. Jackson discussed the Company's August 20 economic proposal with the employees, after which the employees asked what they could do about the fact that supervisors were doing their work, asked what the supervisors were getting paid for doing their work, and complained that the supervisors were assigned to the best paying incentive jobs whereas the employees were assigned the lesser paying incentive jobs. They also asked what could be done about bringing the Employer to the bargaining table prior to September 2 as they stated they felt the Employer was stalling the negotiations.

In discussing the strike, Jackson testified, the employees informed her that they wanted to strike "because the Company was stalling and they felt it was not bargaining in good faith." Consistent with Jackson's testimony employee Wilson testified that the union agents in attendance at this meeting told the workers "we can go on the strike on the unfair labor practices because negotiations started in January and it was almost the end of August and it went so long they say [Respondent] was not negotiating faithfully, so we have to do something about it." In general, the employees expressed the opinion that the Company was stalling the negotiations in order to complete the work in process for the large K-Mart order at which point, the employees thought, the Company would operate without the employees relying on its supervisors to do the remaining work. The employees took the position that in view of this the best time for them to strike was August 25 so as to place the maximum pressure on the Company to reach a quick agreement. They unanimously voted to strike.

The Union's August 23 Telegram and the Commencement of the Strike on August 25

On August 23, following the employees' vote to strike, Jackson telegrammed Mason that the ILGWU, in response to Respondent's August 20 economic proposal, proposed the following:[15] That Respondent accept the Union's proposals regarding union security, no-strike no-lock out, contracting and subcontracting, discharge and grievance procedure, and paid holidays; that the hours of work be clarified to conform to IWC orders; that Respondent drop subcontracting from its management-rights clause; the Union would drop its new machinery proposal; the Union would accept Respondent's incentive plan adjustments if Respondent accepted a specified union proposal. On the subject of economic items the Union proposed that Respondent pay its workers the minimum wages proposed by the Union and that new hires on incentive jobs receive 20 cents above the Federal minimum during their probationary period and then the contractual minimum, whereas nonincentive workers be paid 10 cents below the contractual minimum during their probationary period and thereafter receive the contractual minimum; that all employees be paid a 35-cent-an-hour across-the-board wage increase or raise to the contract minimum and/or Respondent's August 20 wage proposal whichever was greater; that Respondent contribute to a fully paid health plan for the employees and contribute 50 percent for the employees' dependents. The Union proposed that the agreement signed by the parties be for 1 year effective September 1. The telegram concluded with the following declaration:

> Unless and until meaningful bargaining takes place and information on supervisors forwarded in the form demanded in the proposed NLRB notice, no work will be performed by bargaining unit employees at Whisper Soft, and boycott procedure sanctioned by law will be implemented.[16]

On August 25 the Union commenced a strike against Respondent and picketed Respondent with signs which stated, "Whisper Soft Unfair." All of the unit employees honored the picket lines.

The September 2 Bargaining Session

The parties exchanged proposals and at the conclusion of the meeting were still apart on such significant items as union-security; wages and fringe benefits; the layoff and recall of laid-off employees; management-rights; and the contracting and subcontracting of work, particularly the unit work being done by supervisors.

[14] The description of this meeting herein is based on Jackson's and Wilson's testimony. Their testimony in virtually all significant respects does not conflict. And, insofar as their testimony does conflict about the question of whether supervisors' wages was mentioned, as previously noted, I have credited Jackson who impressed me as the more credible witness.

[15] The telegram was not received by Respondent until August 25.

[16] The reference to "the form demanded in the proposed NLRB notice" is to the settlement agreement submitted by the Board to Respondent in Case 20-CA-15493 which in pertinent part states that Respondent will furnish the ILGWU "with the names, rates of pay and benefits of those supervisors who performed work normally performed by unit employees." This proposed settlement agreement was not received by Respondent until on or about August 25.

Regarding the withdrawal of the unfair labor practice charges and the reinstatement of the strikers these subjects were first brought up by the Union which proposed the "Union will withdraw unfair labor practice charges and company to reinstate all employees immediately upon settlement." Respondent's counterproposal submitted at this meeting did not mention the reinstatement of the strikers but with respect to the withdrawal of the unfair labor practice charges stated, "union to withdraw with prejudice all unfair labor practice charges filed to date." Thereafter, the Union during this meeting submitted a further proposal which, among other things, provided that "union will withdraw unfair labor practices with prejudice if all striking employees reinstated immediately upon settlement-this means *all*."

On the status of the strikers Mason told the union negotiators that the Company had decided to continue operating during the strike and had started to permanently replace the strikers and that when the strike ended the strikers, as economic strikers, would be placed by the Company on a preferential hiring list and reemployed when openings became available. Anderson took the position that the strikers were unfair labor practice strikers who could not be permanently replaced.

Regarding the Union's request for the wages of the individual supervisors, Mason asked if the Union would keep the information it had requested confidential or accept an average of the supervisors' pay. Anderson answered in the negative. He stated that the Union wanted the information as requested in the Union's August 23 telegram and as set out in the complaint issued by the Board.

The September 3 Bargaining Session

The parties discussed all of the open issues without making any progress. Anderson asked Mason for a list of the striker replacements and the names of the employees whom they replaced. Mason stated he would get this information for the Union and in fact this information was furnished to the Union within the next few days. The Federal mediator, outside of the presence of the Union's negotiators, told the Company's negotiators that the Union was talking about the possibility of ending the strike and asked if this did happen how many of the strikers would the Company take back. Lyons indicated that Respondent was in a position to return seven strikers immediately and the remainder in 2 or 3 weeks.

The September 4 Bargaining Session

The parties exchanged further proposals at this meeting. In certain areas they were able to narrow the issues which divided them; however, they were still apart on significant times at the conclusion of the meeting. Specifically, they were still in dispute about union security, wages, the subcontracting out of work including the use of supervisors to do unit work, the grievance procedure, management rights, and whether the ILGWU would be a party to and sign the contract. Nonetheless, Anderson testified that he felt negotiations were "going quite well" as both sides had compromised their respective positions on a number of issues and that Respondent had accepted the Union's health and welfare proposal which was a major concession on its part. Anderson advised the mediator that even though the Union had certain problems with the Company's proposals that he felt an agreement on the disputed issues could be reached provided that the questions of "the immediate reinstatement" of the striking employees could be resolved.

On the subject of the reinstatement of strikers, Respondent's written proposal submitted to the Unions at this meeting provided: "union will withdraw all unfair labor practices with prejudice . . . reinstatement terms and conditions of striking employees to be negotiated between parties at any time, but preferably after basic conditional agreements are reached on other open issues." The Union's written proposal submitted to the Company later on at this meeting, on this subject, responded as follows: "union will withdraw all unfair labor practices wth prejudice upon immediate reinstatement of all striking employees without prejudice to seniority rights." In discussing the reinstatement of the strikers, Mason advised Anderson that Respondent had suspended hiring any more new employees to maximize the possibility of achieving an agreement and stated that there were seven immediate openings for strikers and that there would be approximately ten additional openings in a month and the Company would be able to reinstate the remaining ten strikers in about 2 months because of the expected expansion in the work force during the busy season. Anderson took the position that none of the strikers would return to work unless they were able to return as a group as a part of a settlement of the contract. Anderson explained that the Company was obligated to return the strikers to work as a group inasmuch as they were unfair labor practice strikers. Anderson asked Mason to speak to the president of Respondent to determine whether Respondent would change its position on the matter of the reinstatement of the strikers. Mason indicated he would speak to his president.

Regarding the dispute about which union would be a party to and signatory to the collective-bargaining agreement, Respondent's proposal submitted at this meeting stated that "agreement [was] to be between ILGWU and Company, signed by Company president or counsel and an officer of ILGWU per certification." The Union in its proposal, submitted later during the meeting, took the position that the "preamble to the agreement" would be "by and between [Respondent] and [the Council]." Its proposal was silent regarding the signatory. But when Mason advised Anderson that one of the strikers, Ruiz, had been fired that day for engaging in picket line misconduct Anderson stated that the Union might not contest Ruiz' termination if the Company agreed to treat his termination as a voluntary resignation and agree that the Council, rather than the ILGWU, could sign the contract. Mason rejected this proposal. Anderson stated that to have the ILGWU as the signatory to the contract would be an embarrassment, that he knew that he could not bargain to the point of impasse over his demand that the Council be the signatory to the contract inasmuch as it was not a mandatory subject and because of this, Anderson told Mason, that Anderson would have to "hang

[Respondent] up on something else." Mason stated that it would help him evaluate the company position on this matter if he knew what the value of the Council's assets were in order to determine whether the Council was solvent. Anderson stated that the Council had assets valued at $800,000 and in response to Mason's request promised to supply him the next day with the LM-2 form submitted by the Council to the Department of Labor.[17]

During this meeting Mason told Anderson that the average hourly rate of pay for the seven supervisors currently employed by Respondent was $6.44 an hour and told him that the supervisors received the identical fringe benefits as the employees plus an extended leave policy, they were not docked if late or absent for doctor's appointments, and that two of the supervisors received quarterly bonuses of $150 and the remaining five supervisors received quarterly bonuses of $100.[18]

September 5 Bargaining Session

Mason advised Anderson that Respondent's position concerning the striker replacement remained unchanged. He explained that Respondent had made a commitment to the striker replacements and in view of this could not lay them off in order to return the striking workers. Mason stated that since the strikers were economic, rather than unfair labor practice strikers, Respondent was entitled to permanently replace them. Anderson stated he felt that if the "immediate reinstatement" of the strikers could be settled that the parties would be close to reaching a contract but that the Union was not prepared to compromise any further on other disputed issues without the Company's agreement to immediately reinstate the strikers. Anderson stated that the Union could not agree to the piecemeal reinstatement of strikers, that they were unfair labor practice strikers, and that if Respondent wanted him to withdraw the unfair labor practice charges Mason would have to get all of the strikers back to work.

The mediator told Mason that in his opinion if the parties could resolve the issue of the reinstatement of the strikers he felt the other disputed contract proposals could be resolved and asked Mason to reduce to writing the Company's final offer. Mason, pursuant to the mediator's request, submitted to the Union "[Respondent's] revised total offer to ILGWU." This offer reiterated the Company's previous position that the ILGWU be a party to the contract and that the contract be signed by an authorized agent of the ILGWU, but concluded with the qualification that "upon submission of December 31, 1979 LM-2 of Council, Company will reconsider its current position." On the subject of the withdrawal of the unfair labor practice charges the proposal states that the Union and the Company will withdraw with prejudice all unfair labor practice charges. And, in a separate provision dealing with the reinstatement of the strikers, proposed:

> Recall of striking employees: Based upon union representations that no such employees will return to work unless and until all striking employees are returned to work at the same time, the company agrees to recall all such employees as a group at the same time, except for Al Ruiz, as soon as such recall becomes possible i.e., when enough work is available. In any event, the company shall recall all such employees, except for Al Ruiz, commencing no later than October 6, 1980. If current employees and returning strikers are too great in number to offer all of them full time work, the company shall immediately layoff and later recall both groups pursuant to the terms and conditions contained in the agreed upon seniority article.

Anderson rejected this proposal and also rejected the mediators suggestions that Respondent offer to reinstate 10 strikers immediately, 10 the following week, and 10 the week after that.

September 17 Bargaining Session

On September 17, the parties met again at the request of the mediator. The Union failed to respond to Respondent's last contract offer and refused to discuss the open issues. The Union took the position that the issue of the immediate reinstatement of the strikers had to be resolved first. Mason advised the mediator that because additional employees had been hired since September 5, striking employees could no longer be returned as a group on or before October 6 as proposed in Respondent's last proposal. Anderson asked whether the striker replacements were permanent replacements, and Mason answered that they were. Anderson took the position that this meant that the strikers had been discharged, but Mason assured him that there was only one employee who had been discharged and this was Al Ruiz.

Mason's September 25 Letter

On September 25 Mason wrote Anderson explaining the conversion privilege included in Company's group insurance plan and enclosed forms entitled "notice of conversion privilege" and "request for conversion information." The letter concludes by stating that "the company assumed you will take all necessary steps to advise striking employees of their conversion rights should they desire to continue their various coverages." Mason testified that he sent this letter because there is a conversion privilege in both the employees' policy and the California Insurance Code that provides for conversion during a strike and Mason thought it was incumbent on the Company to bring this matter to the Union's attention since it was the employees' bargaining representative.

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[17] The Union never furnished this information.

[18] The description of this meeting is based on a composite of Mason's and Anderson's testimony where their testimony was not in conflict. In those areas where their testimony conflicts I have credited Mason who took contemporaneous notes of the meeting and who impressed me as a reliable witness. Specifically, I reject Anderson's testimony insofar as it either expressly or by implication indicates that he did not offer to deal with the Company about Ruiz as testified to by Mason, that he specifically advised Mason that in order to facilitate agreement on the reinstatement of the strikers he would agree to exclude Ruiz from the group of strikers whom the Union was asking the Company to reinstate, and that Mason stated that the Union's proposal that the Council be a signatory to the contract would "not be a problem" for the Company if the Union furnished Mason with the information he requested.

The November 14 Bargaining Session

On November 14 the parties, at the request of the mediator, met for the last time. Attorney Nathan was present for the Union due to Anderson's absence. Initially, both parties indicated that their respective bargaining positions remained unchanged. In addition, Nathan asked Mason for information pertaining to the striker replacements. Mason asked that this request be reduced to writing. Nathan asked whether the Company was prepared to take back the strikers because that was the real stumbling block to reaching an agreement and if the Company could agree to take back the strikers that Nathan felt there was almost no question that the parties could agree on the other issues. Mason stated that Respondent did not have as many vacant positions as were available on September 5 or September 17. Nathan took the position that the Union and the employees were not going to go back to work in a piecemeal fashion, they were not going to go back to work without a contract, and Respondent was going to have to reinstate all of the strikers, including Chandler and Ruiz.[19] Mason asked Nathan to caucus with the striking employees to determine how many were really interested in coming back to work as Respondent, Mason stated, might be able to stretch to accommodate them. Nathan replied that the strikers were not coming back without a contract and they were not coming back unless Respondent offered immediate reinstatement to all of the strikers as a group. Nathan's sentiments were echoed by Harriet Hawk, a striking employee who was a member of the Union's negotiation committee. She stated that "they were not going to come back one or two at a time without a contract, that they were all together and unless [Respondent] were [sic] willing to sign a contract and offer jobs to all 27 people the strike would continue."[20]

Respondent's Refusal to Furnish Information to the Union About the Striker Replacements and its Withdrawal of Recognition

On December 10 Nathan wrote Mason as follows:

> You will recall during our last meeting, on November 14, that I requested information concerning the bargaining unit employees. At that time you stated that if I put my request in writing, you would be glad to comply.
>
> Therefore, I would appreciate you sending me the following:
>
> (1) Name and address of each employee hired by Whisper Soft since August 25, 1980;
>
> (2) Job classification of each such employee;
>
> (3) Wage rates paid each such employee, including any changes in the wage rate since the initial rate was paid;
>
> (4) Date of hire of each such employee; and
>
> (5) Date of termination, if any, of each such employee and the reason for such termination.

By letter dated December 16 Mason replied as follows:

> Yesterday we received your request for data dated December 10, 1980. As you know, the certification year with the I.L.G.W.U. ran on or about November 28, 1980. As of that time, the above-referenced employer had and continues to have a good faith doubt that the I.L.G.W.U. continues to represent a majority of its employees in the bargaining unit which the I.L.G.W.U. represented. Accordingly, we must decline to respond to your data request.

C. *Conclusionary Findings*

1. Respondent's refusal to submit a wage counterproposal

The complaint in Case 20-CA-15493 alleges that Respondent's failure and refusal to make a wage counterproposal for a period of 4 months constituted a refusal to bargain within the meaning of Section 8(a)(5) of the Act. There is no allegation that Respondent engaged in overall bad-faith bargaining or "surface" bargaining.

As I have described in detail *supra*, Respondent delayed making a wage counterproposal for approximately 4-1/2 months, from April to August, despite the Union's repeated requests for such a proposal. The reason for the delay, which Respondent's negotiator explained during the negotiations, was the Company's busy season did not start until September, that the Company's business was in a depressed condition and a substantial number of employees, more than usual, had been laid off, and, of major significance, was the fact that management was in no position to make meaningful determination of the amount of the wage increase it could afford until its next scheduled increase in customers' prices which was not scheduled until September, at which time management, consistent with its usual practice, would determine how much of the price increase could be allotted to labor costs. In short, Respondent's delay in making its wage proposal was based on legitimate business considerations, and, as indicated, *supra*, there is no allegation that Respondent was guilty of overall bad-faith bargaining or "surface" bargaining. Quite the contrary, the description of what took place during the negotiations, set out in detail *supra*, as well as the content of the Company's proposals, does not portray an employer who was attempting to avoid agreement. Nor does the record otherwise establish that Respondent's conduct in delaying its wage proposal was a tactic designed to obstruct bargaining or to prevent the parties from reaching agreement on the terms of contract.[21] I have carefully considered and re-

[19] Chandler was a striker who had been discharged September 24 allegedly for engaging in picket line misconduct.

[20] Nathan and Mason testified about this meeting. Insofar as their testimony conflicts, I have credited Mason who impressed me as a more credible witness.

[21] This is not a case where an employer has refused to discuss wages and other economic benefits unless and until the parties reached agreement on noneconomic matters. Thus, *South Shore Hospital v. NLRB*, 630 F.2d 40 (1st Cir. 1980), and cases cited therein, are significantly different from the instant case. Likewise, *Clear Pine Moulding v. NLRB*, 632 F.2d 721 (9th Cir. 1980), relied on by the General Counsel and Charging Party, differs significantly from the instant case. There the employer refused to negotiate with the union until the employer reviewed the collec-

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jected the General Counsel's argument that Respondent's principle justification for its delay in making a wage counterproposal, its assertion that employees' wages were normally raised at the same time as its customers' prices, was a fabrication. Other than evidence that Respondent granted new employees pay raises after 30, 60, and 90 days and granted isolated employees special merit raises in between those periods when customers' prices were increased, the General Counsel failed to present evidence to refute Vice President Lyons' testimony that during the past few years Respondent increased its employees' wages at the same time it increased customers' prices. As a matter of fact, the record reveals that in 1978 and 1979 pay raises were granted contemporaneously with increase in prices. I realize that Lyons' testimony established that on or about February 1, 1980, Respondent raised its prices and that a comparison of the General Counsel's Exhibits 4(a) and 12 reveals that employees were not granted a pay raise at that time and that no evidence was presented to explain why Respondent was not able to use at least a part of the money from this increase in prices to make a meaningful wage counterproposal at the outset of the negotiations. However, the General Counsel bears the burden of proof in this proceeding and the record reflects that due to the depressed state of business during its off season Respondent was not in a position to make a meaningful wage offer until its busy season commenced. The General Counsel presented no evidence to refute this. Under the circumstances, I do not feel warranted in drawing an inference adverse to Respondent's case from its failure to use a part of the money from its February 1 price increase to make a wage counterproposal. It is for the foregoing reasons that I find that the General Counsel has not proved that the reason advanced by Respondent for its delay in making a wage counterproposal was a fabrication.[22]

Based on the foregoing, I shall recommend the dismissal of the allegation of the complaint in Case 20-CA-15493 which alleges that Respondent violated Sections 8(a)(1) and (5) and 8(d) of the Act by failing and refusing to make a wage counterproposal.

2. Respondent's refusal to furnish wage and benefit information about its supervisors

(a) *The evidence*

The complaint in Case 20-CA-15493 alleges that since June 16 Respondent has refused to furnish the Union with the names, rates of pay, and benefits paid to the supervisors employed by Respondent who perform work normally done by unit employees, thereby violating Section 8(a)(5) and (1) of the Act. The evidence pertinent to this allegation had for the most part been set forth in detail *supra*, and is briefly stated herein.

Respondent's seven supervisors are not members of the certified bargaining unit and are supervisors within the meaning of the Act who are not represented by the Union. The supervisors have always performed bargaining unit work in addition to their supervisory duties. Since September 1979 the vast majority of unit employees, in addition to receiving an hourly rate of pay, have worked under an incentive system. The supervisors are paid a salary, rather than an hourly rate of pay, even when performing this incentive work.

During the Company's seasonal slowdowns, it lays off a significant number of unit employees, but keeps its supervisory work force intact. During these periods of substantial layoffs, the supervisors spend most of their time doing bargaining unit work rather than supervising. Lyons, Respondent's vice president in charge of production, testified that during these periods of layoff the amount of unit work done by the supervisors increased significantly inasmuch as they were used by the Company to do the unit work normally performed by the laid-off workers, but that they continued to exercise their supervisory functions. During the time material herein, when the Union made its initial requests for the supervisory data, Respondent was in the midst of a slack business period and as a result of the layoffs of unit employees there were the same number of supervisors employed as unit employees, seven supervisors and seven unit employees.

On approximately June 13, as described in detail, *supra*, the Union requested Respondent to furnish it with the names and rates of pay of the supervisors who were doing unit work. Each supervisor, on learning of this request, objected to the Company disclosing their individual rates of pay and asked the Company to keep this information confidential.

On June 16, as described in detail, *supra*, Mason, for Respondent, advised the Union about the supervisors' feelings and stated that Respondent was taking the position that the pay of the supervisors was confidential information and, in addition, Respondent did not believe that the information was relevant for collective-bargaining purposes. In reply, Anderson, for the Union, stated that the requested information was relevant because if it showed Respondent was paying its supervisors more money than its unit workers then it did not make economic sense for Respondent to take the position, as it was doing, that it was unable to make a wage offer at that time or for Respondent to lay off unit employees and retain the supervisors to do the unit work. Mason stated he was still unable to see the relevancy of the individual supervisors' wage rates and explained why. Thereafter, by letter of July 16, Mason informed Anderson that if the Union were not satisfied with his June 16 explanation for refusing to furnish the Union with supervisors' rates of pay and if Anderson could explain "the relevancy of the precise information" that Mason would

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tive-bargaining agreements made by labor organizations with the employer's competitors and when the union refused to delay negotiations for this reason, the employer engaged in dilatory, surface bargaining to achieve this purpose. Also essential to the finding that the employer's conduct in *Clear Pine Moulding* violated Sec. 8(a)(5) was the conclusion that the employer could not refuse to bargain about economic matters until it reviewed its competitors contract settlements inasmuch as this was a nonmandatory subject of bargaining. *Id.* at 730.

[22] In so concluding I have considered the October 27 conversation between attorneys Mason and Nathan and am unable to draw an inference from Mason's remarks, viewed either in isolation or in the context of the whole record, that Respondent, as contended by the General Counsel, "deliberately embarked on a course of bargaining designed to frustrate the reaching of an accord and to consume the certification year."

be happy to review the Union's information request with Anderson.

On August 20, the day Respondent submitted its initial economic proposal, Anderson repeated the Union's request for the names and rates of pay of the supervisors who performed unit work. Mason in reply presented Anderson with two options: Respondent would furnish the Union with the names and individual rates of pay of the seven supervisors who performed unit work provided that the Union agree to keep this information confidential from the employee members of the Union's negotiating committee or, if this was not acceptable, Respondent would furnish the Union with the average hourly rate of pay of the seven supervisors as a group. The union representatives stated they would consider this proposal and thereafter by telegram dated August 23 rejected it without explanation. The telegram in effect informed Respondent that the Union wanted the Company to furnish it with the names, rates of pay, and benefits of the individual supervisors who performed unit work. This was the first time that the Union has asked Respondent to furnish it with the supervisors' benefits. Subsequently, at the negotiation meeting of September 4 Mason informed Anderson that the average hourly rate of pay of the supervisors was $6.44 and with respect to the supervisors' benefits stated that they received the identical fringe benefits as the unit employees plus other benefits which he enumerated and that two supervisors received a quarterly bonus of $150 and the remaining five a quarterly bonus of $100. Upon receipt of this information the Union's representatives remained silent. No one from the Union either at this time or at any other time, including at the hearing in this case or in the Union's post-hearing brief, has claimed that the information furnished by Respondent did not meet its need or explain why it failed to meet its needs. Nor does the General Counsel contend that the information supplied by Respondent failed to meet the Union's needs or explain why the information did not meet the Union's needs.

As described in detail, *supra*, during the negotiations Anderson informed Mason that the Union needed the supervisors' names and individual rates of pay to evaluate Respondent's position that it was unable to make a wage offer until September and to evaluate Respondent's practice of laying off unit employees instead of supervisors during slack business period. During the hearing Anderson added a third reason. He testified that the information was relevant so the Union could evaluate its own wage proposal, that is to show Respondent paid its supervisors more for doing unit work than the Union was proposing that Respondent pay the unit employees for doing the identical work, thereby demonstrating reasonableness of the Union's wage proposal.

(b) *Discussion*

In summation, the record reveals that the Union asked Respondent to furnish it with its supervisors' names, rates of pay, and benefits, but that because they objected to having their financial terms of employment publicized Respondent refused to supply this information in the precise form requested. Initially Respondent proposed that the Union's negotiators keep the individual supervisors' rates of pay confidential from the employees on the Union's negotiation committee. When the Union rejected this offer, Respondent, rather than give the Union the individual supervisors rates of pay and bonus payments, instead supplied the supervisors' average hourly rate of pay as a group and the amount of their individual bonus payments without naming names. The question presented for decision is whether under the circumstances of this case Respondent, in supplying the aforesaid information rather than supplying the information in the precise form requested, violated its statutory duty to bargain in good faith.

There is no "absolute rule" in information disclosure cases that "union interest in arguably relevant information must always predominate over all other interest, however legitimate." *Detroit Edison Co. v. NLRB*, 404 U.S. 301, 308 (1979). "A shotgun approach to enforced discovery may be inappropriate" and the employer "is entitled to show that special circumstances justify some protection, just as parties to litigation may be entitled to protective orders in the course of discovery." *Western Massachusetts Electric Co. v. NLRB*, 589 F.2d 42, 47 (1st Cir. 1978). When, for substantial and legitimate reasons, an employer refuses to furnish a union with relevant information in the precise form requested, but instead furnishes the information in an alternative form, it is necessary to strike a reasonable balance between the union's asserted interest in unlimited disclosure and the employer's asserted interest in limited disclosure. *Detroit Edison Co. v. NLRB*, 440 U.S. at 314–319; *Press Democrat Publishing Co. v. NLRB*, 629 F.2d 1320 (9th Cir. 1980); *Emeryville Research Center v. NLRB*, 441 F.2d 880, 885 (9th Cir. 1971). The type of disclosure that will strike such a balance turns on "the circumstances of the particular case." (*Detroit Edison Co. v. NLRB*, 440 U.S. at 314–315, quoting from *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956)), and the Board and courts have indicated that limited disclosure is reasonable and sometimes required in a wide variety of cases. See, e.g., *Times-Herald*, 240 NLRB 439 (1979); *Johns-Manville Sales Corp.*, 252 NLRB 368 (1980); *Detroit Edison Co. v. Boston Herald Traveler Corp.*, 210 F.2d 134, 137 (1st Cir. 1954); *Detroit Edison Co. v. NLRB*, 440 U.S. at 316–319; *Emeryville Research Center v. NLRB*, 441 F.2d at 880–883; *Shell Oil Co. v. NLRB*, 458 F.2d 615, 616–618 (9th Cir. 1972).

In reviewing the asserted relevancy of the information requested by the Union in the instant case I am of the opinion that whatever advantages of knowing the identities of the supervisors involved, this information does not appear essential for the specific purposes claimed or any related purpose. In fact, at no time during the negotiations or during the hearing herein or in its post-hearing brief has the Union explained why it was necessary to have the names of the supervisors linked to the wage and bonus data in order for the Union to use this information intelligently for the desired purpose. The disclosure of the supervisors' average hourly rate of pay as a group and the bonuses paid to them, without linking said bonuses to named supervisors, was sufficient for the purpose of bargaining for which the Union stated it needed

the information; namely, to demonstrate that the supervisors' wages were higher than the unit employees and higher than the wages proposed by the Union for the unit employees. I realize that Respondent did not supply the Union with the average hourly rate of pay for each supervisor, but the group's, average hourly rate of pay appears to be sufficient to satisfy the Union's need and, in any event, it was the Union's adamant insistence on its absolute right to have the information in the precise form demanded and its refusal to engage in any discussion with Respondent about furnishing the information in an alternative form which was calculated to preclude Respondent from furnishing the wage information on a supervisor-by-supervisor basis as it did in the case of the supervisors' bonus payments. Under the aforesaid circumstances, assuming that the names, rates of pay, and benefits of Respondent's supervisors may be relevant to the Union in its role as collective-bargaining representative of the unit employees, I am of the opinion that the Union's showing of need does not outweigh the special circumstances relied on by Respondent, described *infra*, to furnish such information in a different form than requested by the Union. I am also of the opinion that Respondent acted in good faith when it refused to furnish the information in the precise form requested inasmuch as there is a complete absence of evidence that Respondent fabricated a concern for the supervisors' privacy or used the supervisors' concern for their privacy as a means of frustrating the Union in the discharge of its collective-bargaining responsibilities.

Although, as described above, Respondent acted reasonably and in good faith to accommodate the Union's need for the requested information and, in fact has apparently accommodated the Union's need, it does not end this matter because "the weight of the Respondent's assertion of confidentiality is also . . . subject to scrutiny." *Johns-Manville Sales Corp.*, 252 NLRB 368. As I have found *supra*, each supervisor informed Respondent that they felt their wages were confidential and should not be revealed. It was only natural that the supervisors objected to such a sensitive matter as their personal wage information being made public. This is especially true where as here the supervisors were not represented by the Union. Of course, this privilege of confidentiality belonged to the supervisors and not to Respondent. In this regard, I note that Respondent refused to furnish the information in the precise form requested only after each supervisor had notified Respondent that they felt such information was confidential. Also Respondent has demonstrated that its refusal to disclose this sensitive information was made in good faith, since it sought to accommodate the Union by supplying the information using alternative methods which were calculated to satisfy the Union's need. Finally, there is no evidence that Respondent raised the issue of confidentiality for the purpose of furthering parochial concerns or to frustrate the Union's attempt to represent the unit employees, rather than for the purpose of protecting the supervisors privacy.

In summation, I conclude that disclosure of the supervisors' average hourly rate of pay as a group and disclosure of their quarterly bonuses without identifying the supervisors was sufficient for the purposes for which the Union has stated it needed the requested information. I further conclude that such limited disclosure sufficiently avoided revealing the rates of pay and bonuses of identified supervisors, which information the supervisors legitimately considered confidential because of its sensitive nature especially since the supervisors were third parties, who as members of management were not represented by the Union. Unlimited disclosure, on the other hand, would not only have revealed the specific amounts paid to the named supervisors but would also have been insignificant to the Union for its purpose of bargaining about the wages and other working conditions of the unit employees. These conditions plus the fact that Respondent acted in good faith when it refused to furnish the information in the precise form requested and offered to discuss furnishing it in alternative forms, persuades me that, on balance, Respondent has not violated Section 8(a)(5) and (1) of the Act by refusing to furnish the supervisors' rates of pay and benefits in the precise form requested by the Union.[23] I therefore shall recommend that this allegation as set forth in the complaint issued in Case 20–CA–15493 be dismissed in its entirety.

3. Respondent's refusal to supply information about the striker replacements and its withdrawal of recognition from the ILGWU

(a) *The evidence*

A Board election was conducted among the Company's production employees on November 20, 1979. The ILGWU won the election by a vote of 37 to 10 and was certified by the Board on November 29, 1979.[24] Between January and November the parties, as described in detail *supra*, held 18 bargaining sessions, but were unable to reach agreement on a contract. Meanwhile, on August 25 the ILGWU began an economic strike and established a picket line.[25] The strike and picketing were still in progress in January 1981 when the hearing in this case took place.

When the strike commenced Respondent employed 27 unit employees all of whom supported the strike. As of the date of the hearing, in January 1981, all but one of the strikers, Maxine Machado, were still on strike.[26] At the end of the certification year on November 29, 1980, all 27 of the strikers had been permanently replaced and because of expanding business Respondent had hired 13 additional unit employees.[27] On December 16, the date

[23] In view of this conclusion, I have not considered Respondent's argument that the names, rates of pay, and benefits of the supervisors were not relevant to the Union's role as the representative of the unit employees. Nor have I considered Respondent's further contention that the Union's position that it needed the supervisors' names and rates of pay in order to evaluate the Union's wage proposal, raised for the first time during the hearing herein, was untimely.

[24] The election tally of ballots shows that there were approximately 58 eligible voters.

[25] As I have found *infra*, the ILGWU's strike was not an unfair labor practice strike.

[26] Machado, as described *infra*, "gave up on the strike" and moved out of the area to look for work with another employer.

[27] Respondent's business is seasonal and due to this its employment complement fluctuates. The record establishes that its busiest season is from September through December.

Respondent withdrew recognition of the ILGWU, in addition to the 27 striker replacements Respondent employed 7 other unit employees, a total of 34 unit employees. All employees working in the plant during the strike crossed the picket line daily and all but four of the striker replacements and others who were hired during the strike crossed the picket line to apply for employment and 75 percent of them applied in response to an advertisement which stated that there was a labor dispute in progress.

In September, during the strike, Respondent discharged strikers Ruiz and Chandler for engaging in picket line misconduct. In October striker Dolzadell asked Vice President Lyons if she could come back to work. Lyons agreed to put her back to work, but thereafter Dolzadell notified Lyons she had changed her mind because one of the union representatives had told her not to return to work. On December 5 striker Machado informed Lyons that she had "given up on the strike" and had moved out of the area to look for work with another employer.

Regarding discussions between the parties about the reinstatement of the strikers, the record which has been described in detail, *supra*, shows that the parties bargained to an impasse on this subject. Respondent viewed the strike as an economic one whereas the ILGWU viewed the strike as an unfair labor practice one. During the negotiations the ILGWU took the position that since the strikers were unfair labor practice strikers Respondent could not permanently replace them and was obligated to immediately reinstate all of the strikers as a group, even if it meant discharging the striker replacements. In addition, the ILGWU's negotiators insisted that no contract would be negotiated unless and until all of the strikers were reinstated pursuant to the ILGWU's reinstatement proposal.

During the last negotiation session held on November 14, the ILGWU asked Respondent to furnish it with information pertaining to the striker replacements, as follows: names; addresses; job classifications; wage rates and changes in said rates; dates of hire and termination; and reason for termination. Respondent's spokesperson, attorney Mason, agreed to comply with this request but asked that it be reduced into writing. On December 10, the ILGWU, through its attorney, wrote Mason asking for this information. On December 16 Mason, by letter, refused to comply with this request because Mason stated that Respondent had "a good faith doubt that the ILGWU continues to represent a majority of its employees in the bargaining unit which the ILGWU represents."

(b) *Discussion*

As described *supra*, Respondent withdrew recognition from the ILGWU on December 16, shortly after the expiration of the certification year. The question presented here is whether the facts known to Respondent at that time justified its withdrawal of recognition.[28] If they did not Respondent violated Section 8(a)(5) and (1) of the Act by withdrawal of recognition.[29]

Absent unusual circumstances, a union is irrebuttably presumed to enjoy majority status during the first year following certification. *Ray Brooks v. NLRB*, 348 U.S. 96, 98-104 (1954). Upon the expiration of the certification year, the presumption of majority status continues but becomes rebuttable. An employer who wishes to withdraw recognition from a certified union after a year may rebut the presumption by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain.[30] E.g. *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486 (2d Cir. 1975). "Any doubt as to the continuing majority status must rest on a reasonable basis and may not depend solely on unfounded speculation or subjective state of mind." *NLRB v. Gulfmont Hotel Co.*, 362 F.2d 588, 589 (5th Cir. 1966), and, "the objective evidence submitted by the Company must be clear, cogent and convincing." *Pioneer Inn Casino v. NLRB*, 578 F.2d 835, 839 (9th Cir. 1978).

In the instant case Respondent's attorney, Mason, testified that his December 16 letter, in which Mason informed the ILGWU that Respondent was withdrawing recognition because it had a good-faith doubt of the ILGWU's majority status, was based on the fact that "the number of permanent replacements substantially exceeded the number of employees who went out on strike" and upon Vice President Lyons' remarks about strikers Dolzadell and Machado. In Respondent's post-hearing brief Mason, in support of Respondent's good-faith doubt of the ILGWU's majority status, also relies on the contention that the ILGWU had abandoned the unit employees thereby causing Respondent to believe that the unit employees no longer supported the ILGWU. This justification was not mentioned by Mason during this testimony and has all of the earmarks of an afterthought. In any event, the record fails to indicate that the ILGWU abandoned the unit employees or that the employees had communicated this conclusion to Respondent or that Respondent could have reasonably believed such was the situation. Thus, on December 16 the strike and the accompanying picketing was still in progress. Other than striker Machado, none of the strikers had indicated to Respondent that they had abandoned the strike. The fact that no negotiations had taken place for 1 month prior to the December 16 withdrawal of recognition can hardly be construed as an indication that the ILGWU had abandoned the unit employees, particularly where as here the negotiations had reached

[28] Respondent conceded at the hearing that if its withdrawal of recognition was unlawful, its refusal to supply the ILGWU with the information about the striker replacements was unlawful.

[29] The amended complaint in Case 20-CA-15493 which alleges that Respondent violated Sec. 8(a)(5) and (1) by refusing to supply the information about the striker replacements does not allege that Respondent's withdrawal of recognition was unlawful. However, all of the parties have agreed that the matter of Respondent's December 16 withdrawal of recognition was encompassed within the allegations of the amended complaint and was fully litigated and that in view of this the propriety of this conduct should be decided in this proceeding.

[30] The employer may also rebut the presumption of majority status by showing that on the date recognition was withdrawn, the Union did not, in fact, enjoy majority support. In the instant case, Respondent does not contend that the record establishes that, in fact, the ILGWU did not enjoy majority support.

the point of impasse. Likewise, the ILGWU's failure after June 16 to request another bargaining session for almost 2 months was hardly calculated to cause Respondent to believe that the Union had abandoned the unit employees inasmuch as it was Respondent's inability to make a meaningful economic proposal until late August which created an impasse in negotiations, thereby making further bargaining sessions unfruitful. Finally the ILGWU, immediately prior to Respondent's withdrawal of recognition, had indicated to Respondent that it was still actively engaged in representing the unit employees when it asked Respondent to supply it with the information about the striker replacements. Under all of these circumstances, I find Respondent's claim that the ILGWU had abandoned the unit employees or that Respondent believed this to be the case and relied on it in withdrawing recognition from the ILGWU to be without substance.

Preliminary to evaluating Respondent's principle argument in support of its good-faith doubt of the ILGWU's majority status, the employment of striker replacements, I note that at the time Respondent withdrew recognition from the ILGWU on December 16 that the unit herein consisted of 58 employees: 24 strikers,[31] 27 striker replacements, and 7 other employees who were hired during the strike.[32]

Respondent's principle argument in support of its contention that it held a good-faith belief that a majority of the unit employees no longer supported the ILGWU is that at the time it withdrew recognition a substantial majority of the unit was comprised of employees who had applied for work in response to an advertisement which informed them of Respondent's labor disputes with the ILGWU, crossed the picket line to apply for their jobs, and after being hired crossed the picket line daily.[33] If this was all there was to Respondent's argument I would be obligated to reject it inasmuch as the Board, with court approval, has held that the mere fact that striker replacements and other employees come to work during a strike through a picket line is insufficient to establish opposition to union representation and that such employees are presumed to support the union in the same ration as the employees they replace. *Pennco, Inc.*, 250 NLRB 716 (1980). *Windham Community Memorial Hospital*, 230 NLRB 1070 (1977), enfd. 577 F.2d 805 (2d Cir. 1978).[34] The Board, however, has made it plain that "the normal presumption regarding the loyalty of striker replacements is rebuttable." *Windham Community Memorial Hospital* at 1070. And I am persuaded that, as urged by Respondent, there were unique circumstances in the instant case on which Respondent premised its belief that the employees who came to work during the strike were not loyal to the ILGWU, thereby rebutting the normal presumption of the loyalty of the striker replacements. Thus, as described *supra*, the ILGWU's bargaining position during the strike was that Respondent must reinstate all of the strikers as a group thereby terminating the striker replacements and that this was a condition for any collective-bargaining agreement between the parties. In short, if the ILGWU's bargaining position which was pressed to impasse prevailed, then the great majority of the employees who were hired during the strike could expect to lose their jobs. Under these circumstances, it would be unrealistic to presume that any one of this group of 34 employees would support the ILGWU.[35] Quite the opposite, in view of the ILGWU's unyielding bargaining position concerning the reinstatement of the strikers and termination of the replacements as a condition for reaching a collective-bargaining agreement, it was reasonable for Respondent to reach the conclusion that all of the employees hired during the strike whose employment would be adversely affected by the ILGWU's proposal did not desire to be represented by that Union. It is for this reason that I am satisfied that Respondent did have an objective basis for a reasonably based doubt as to the ILGWU's continued majority status at the time it withdrew recognition. I shall therefore recommend the dismissal of that portion of the complaint in Case 20-CA-15493 pertaining to Respondent's refusal to supply the Union with the information about the striker replacements and its withdrawal of recognition.

4. The nature of the strike and the allegations pertaining to the strike

The complaint in Case 20-CA-15672 alleges that the strike which commenced on August 25 and which was still in progress at the time of the hearing herein, was caused by Respondent's unfair labor practices; namely, its refusal to make a wage counterproposal for 4-1/2 months and its refusal to supply the ILGWU with the supervisory information it had requested. I have found, *supra*, that this conduct did not violate the Act. Accordingly, I further find that the strike of August 25 was not an unfair labor practice strike in its inception. And since I have found, *supra*, that Respondent's withdrawal of recognition did not violate the Act, I likewise find that the withdrawal of recognition did not convert the strike into an unfair labor practice strike.

The complaint in Case 20-CA-15672 also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by permanently replacing the strikers and by refusing to

[31] This figure is based on the fact that two of the strikers were discharged in September and that striker Machado had abandoned the strike.

[32] For the purpose of evaluating continued majority status during an economic strike the bargaining unit includes all strikers, even if permanently replaced, as well as permanent replacements. *NLRB v. Windham Community Memorial Hospital*, 577 F.2d 805, 813 (2d Cir. 1978); *Pioneer Flour Mills v. NLRB*, 427 F.2d 983, 986 (5th Cir. 1970).

[33] Respondent also argues that the fact that striker Dolzadell asked to return to work during the strike indicated she no longer supported the ILGWU. I disagree particularly where as here Dolzadell subsequently changed her mind and continued to support the strike. In any event, "an employee's return to work during a strike does not provide a reasonable basis for presuming that he had repudiated the union as his bargaining representative." *Pennco, Inc.*, 250 NLRB 716.

[34] But see *National Car Rental System v. NLRB*, 594 F.2d 1203, 1206-07 (8th Cir. 1979), which reaches a contrary result.

[35] I note that since none of the employees hired during the strike could have possibly anticipated which ones would be selected for termination if the ILGWU's proposal was accepted by Respondent that all of them would reasonably be expected to fear termination.

reinstate the strikers upon the Union's request and violated Section 8(a)(5) and (1) of the Act by refusing to the point of impasse to reinstate the striking employees. All of the parties agree that these allegations are bottomed upon the strike in this case being caused or prolonged by Respondent's unfair labor practices. Since the strike was neither caused nor prolonged by unfair labor practices, I shall recommend that these allegations be dismissed in their entirety.

[Recommended Order for dismissal omitted from publication.]